



OHIO ETHICS COMMISSION

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April 11, 1997

Informal Opinion 1997-INF-0411-1

Robert E. Mapes
Assistant Law Director
City of Lancaster

Dear Mr. Mapes:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes preclude the Council of the City of Lancaster (City) from electing the spouse of the President of City Council to the position of Clerk of Council.

You state that the City operates under a statutory plan of government, therefore the Revised Code sets out the statutory authority and duties of the City. R.C. 733.09 provides for the election of a Council President who presides at City Council meetings and has no vote except in the case of a tie. R.C. 731.04 provides that City Council elect the Clerk of Council, and fix the duties, bond, and compensation of office. You state that the City's rules are silent as to the scope of the duties assigned to the Clerk of Council.

As explained below, the Ohio Ethics Law and related statutes do not preclude the City Council from electing the spouse of the President of City Council to the position of Clerk of Council. But the Ethics Laws and related statutes limit the exercise of the Council President's authority with regard to matters involving his spouse's election as Clerk of Council and matters that would affect any of her personal pecuniary interests that would arise after her election.

Prohibition Imposed by R.C. 2921.42 (A)(4)

Division (A)(4) of Section 2921.42 of the Revised Code reads as follows:

- (A) No public official shall knowingly do any of the following:
 - (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected;

R.C. 2921.42(A)(4) prohibits a public official from having an interest in a public contract with his own political subdivision. Advisory Op. No. 81-008.

The term "public official" is defined for purposes of R.C. 2921.42 to include any elected or appointed officer, employee, or agent of any political subdivision. R.C. 2921.01 (A). The Council President is a "public official" and subject to the prohibitions of R.C. 2921.42. Advisory Op. No. 86-008.

The term "public contract" is defined for purposes of Section 2921.42 in Division (G) (1) (a) of that Section to include the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of a political subdivision including the employment of an individual.

In Advisory Opinion No. 91-007, the Ethics Commission held that the clerk of council in a statutory city serves pursuant to a public contract for purposes of R.C. 2921.42. In Advisory Opinion No. 91-007, the Ethics Commission held:

Although a city clerk is appointed to his position through "election" by the members of council and serves for a term of years, absent removal for cause by council, he cannot be said to serve in the manner as an official who is elected to office by the electorate. He is appointed to his position by the legislative body, even though the council, as a multi-member body, must appoint him by acting through a majority of its members to "elect" him. His compensation is fixed by council, and he may be removed by council. Thus, the clerk's relationship with the city, like that of other city employees, may be deemed to be a "public contract," for purposes of R.C. 2921.42.

The Ethics Commission has held that a prohibited "interest" under R.C. 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. Advisory Ops. No. 78-005 and 81-008. In the instant situation, the individual who serves as Clerk will have a definite and direct interest in his or her contract of employment with the City. But the Clerk's spouse will not have a definite and direct interest in the Clerk's contract of employment with the City.

The Ethics Commission has held that, absent facts that indicate otherwise, for purposes of R.C. 2921.42 (A)(4), the contractual interests of spouses are independent of one another. Advisory Ops. No. 82-003, 88-007, and 89-005. See also R.C. 3103.05 (a spouse is statutorily empowered to contract in his or her own right as if unmarried); R.C. 3103.04 (the earnings of a married person constitute his or her separate property); and Board of Education v. Boal, 104 Ohio St. 482 (1922) (since a married woman has a statutory right to contract and retain the earnings from her employment, the wife of a member of a board of education may be employed by the board and her employment would not result in her husband having a prohibited pecuniary interest in a contract with the board). Therefore, for purposes of R.C. 2921.42 (A)(4), a public official is not deemed to have a definite and direct interest in a contract with his own political subdivision merely because his spouse has an interest in such a contract. The Ethics Commission has explained that a public official may have an indirect interest in a public contract from which his spouse profits or benefits, but, an official is not generally considered to have a definite and direct interest in a contract with his political subdivision for purposes of R.C. 2921.42 (A)(4) merely because his spouse has an interest in the contract. Advisory Ops. No. 88-007, 89-005, and 92-017.

In the instant situation, if the spouse of the President of City Council is elected to the position of Clerk of Council by City Council, then the President of City Council will not have a definite and direct interest in the clerk's contract of employment with the City. Therefore, the

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prohibition imposed upon the Council President by R.C. 2921.42 (A)(4) does not, per se, preclude the City Council from electing the spouse of the Council President to the position of Clerk.

Prohibition Imposed by R.C. 2921.42 (A)(1)

The Council President is also subject to the prohibition of Division (A)(1) of Section 2921.42 of the Revised Code which provides that no public official shall:

Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest;

For purposes of R.C. 2921.42 (A)(1), a spouse is a member of a public official's family. Advisory Op. No. 80-001 (setting forth the definition of family member). See also Advisory Op. No. 85-015. As stated above, the individual who serves as clerk of council will have a definite and direct interest in his or her contract of employment with the city.

In the instant situation, neither R.C. 2921.42 (A)(1), nor any other provision of the Ethics Law, would per se prohibit the City Council from electing the spouse of the Council President to the position of Clerk. But, R.C. 2921.42 (A)(1) limits the exercise of the Council President's authority in such a situation. Advisory Op. No. 90-010. The Ethics Commission explained the prohibition of R.C. 2921.42 (A)(1) in Advisory Op. No. 90-010:

R.C. 2921.42 (A)(1) is not a "no relatives policy" which determines eligibility for employment with a political subdivision on the basis of family relationships. . . . The purpose of R.C. 2921.42 (A)(1) is to prevent the possibility that a public official may show favoritism in the exercise of his discretionary, decision-making authority in authorizing a contract for public employment. (Emphasis in original.)

But R.C. 2921.42 (A)(1) prohibits a public official from "authorizing" a public contract in which a family member has an interest or employing his office's "authority or influence" to secure authorization of such a contract. Advisory Op. No. 92-012. See also Advisory Ops. No. 80-001 and 88-007.

R.C. 733.09 establishes the duties of the Council President for statutory cities. As stated above, according to R.C. 733.09, the Council President presides at all meetings of the City Council but has no vote therein, except in case of a tie. The Attorney General, in 1946 OAG No. 744, held that the Council President is not a member of council. See also Advisory Op. No. 91-007. Therefore, the Council President would have to abide by the provisions of R.C. 2921.42 (A)(1) if the election of his spouse to the position of Clerk by City Council resulted in a tie. See Roberts v. Snyder, 149 Ohio St. 333 (1948) (pursuant to R.C. 731.04 and 731.09, a president of city council is empowered to vote in the event of a tie in the city council's election of a clerk of council.) If City Council's vote to elect his spouse to the position of Clerk results in a tie, then R.C. 2921.42 (A)(1) prohibits the Council President from "authorizing" a contract for public employment in which his spouse has an interest by voting to break the tie.

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The Ethics Commission has held that the words "authority or influence" in R.C. 2921.42 (A)(1) specifically characterize a broader range of activity than that described by the word "authorize." Advisory Op. No. 92-012. By prohibiting a public official from employing his office's "authority or influence," R.C. 2921.42 (A)(1) prohibits a public official from exercising the power and influence inherent in the position and prestige of his public office to affect the decision-making process of his public body regarding a public contract in which a family member has an interest, even if he abstains from participating in official proceedings. Id.

In the instant situation, R.C. 2921.42 (A)(1) prohibits the Council President from participating, not only in the vote but in all discussions and deliberations regarding his spouse's election to the position of Clerk of Council. The Council President is prohibited from recommending, discussing, or lobbying the members of City Council and other City officers or employees, or using the authority or influence of his office in any way to secure City Council's election of his spouse to the position of Clerk regardless of whether the Council President does not vote or participate in City Council's official proceedings. Advisory Op. No. 90-010. See also Advisory Op. No. 90-003.

The prohibition against a public official "authorizing" the employment of a family member or employing the "authority or influence of his office" to secure authorization of the employment of a family member extends beyond the initial hiring of a family member. R.C. 2921.42 (A)(1) prohibits a public official from participating in any matter or decision that would affect the individual employment relationship for a member of his family even if the prohibitions imposed by R.C. 2921.42 (A)(1) were inapplicable at the time the initial hiring decision was made. Advisory Opinions No. 82-003, 89-005, and 92-012. These matters and decisions include, but are not limited to, the authorization or approval of payments to the family member for services rendered and the renewal, modification, termination, or renegotiation of the family member's contract for public employment.

If it were held that the prohibitions imposed by R.C. 2921.42 (A)(1) applied only to authorizing or securing a family member's initial employment, then the prohibitions could be effectively circumvented where a public official did not participate in the initial hiring decision, but subsequent to the initial employment he authorized or approved payments to a family member for services rendered, or advocated, recommended, voted upon, or participated in discussions or deliberations regarding such matters as pay raises, additional benefits, or other modifications under the public contract. Cf. Advisory Opinion No. 88-008 (the Ethics Commission has held that for purposes of the "continuing course of dealing" exception of R.C. 2921.42 (C)(2), material changes to a public contract, such as modifications or alterations, transform the original understanding of the parties).

Prohibition Imposed by R.C. 102.03 (D)

Your attention is also directed to R.C. 102.03 (D), which provides:

No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or

offer of anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his duties.

The term "public official or employee" is defined for purposes of R.C. 102.03 (D) to include any person who is elected or appointed to an office of any instrumentality of a city. See R.C. 102.01 (B) and (C). The Council President is a "public official or employee" as defined for purposes of R.C. 102.03, and is, therefore, subject to the prohibitions of that section. Advisory Op No. 91-007.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. See R.C. 102.01 (G). A city employee's continued employment and the compensation received therefor fall within the definition of "anything of value." See generally Advisory Opinion No. 92-012.

The Ethics Commission explained in Advisory Opinion No. 92-010 that R.C. 102.03 (D) prohibits a public official from participating, formally or informally, in any matter that directly affects the private pecuniary interests of the official's spouse where the official's objectivity and independence of judgment could be impaired. See also Advisory Ops. No. 90-004, 91-004, and 92-012. Therefore, R.C. 102.03 (D), as well as R.C. 2921.42 (A)(1), prohibits the Council President from using his authority or influence, formally or informally, with respect to any matter that would affect any aspect of his spouse's employment relationship with the City. These matters would include, but are not limited to, the assignment of duties, evaluations, and actions involving disciplinary actions, lay-offs, removal, modifications of the individual employment relationship, and any other matter relative to his spouse's individual employment relationship. Furthermore, the Council President is prohibited from using the authority or influence of his office, formally or informally, to influence the decisions or actions of City Council Members or other City officers or employees in matters that could affect the interests of his spouse's employment with the City.

The Ethics Commission has held that R.C. 102.03 (D) does not prohibit a public official or employee from participating in general budgetary appropriations to the city department that employs a family member, provided that the appropriations do not provide a definite and particular personal benefit to his family member, but are for the department's general accommodations, supplies, and operating expenses. Advisory Ops. No. 90-004 and 92-012. See also Advisory Ops. No. 91-004 and 92-010.

For example, in the instant situation, R.C. 102.03 (D) does not prohibit the Council President from participating in discussions or breaking a tie vote on an appropriation to purchase new equipment to be used by the Clerk despite the fact that such appropriation would aid his spouse in the performance of her official duties as Clerk, since the appropriation would be for the benefit of the City and not for the personal use or benefit of his spouse. Also, R.C. 102.03 (D) does not prohibit the Council President from participating in a general budgetary appropriation that includes money to fund his spouse's compensation and benefits, provided that his spouse's compensation and benefits are established independently of the appropriation. See generally Advisory Op. No. 92-012. See also Advisory Ops. No. 91-004 and 92-010.

Prohibition Imposed by R.C. 102.03 (B)

Finally, R.C. 102.03 (B) reads as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

R.C. 102.03 (B) prohibits a public official or employee from using or disclosing, without proper authorization, any confidential information acquired in the course of his official duties.

R.C. 102.03 (B) prohibits the Council President from using or disclosing to his spouse, or any other party, without proper authorization, any confidential information acquired in the course of his official duties. For example, R.C. 102.03 (B) prohibits the Council President from disclosing to his spouse any information regarding City Council's discussions, deliberations, recommendations, or decisions regarding her election to the position of Clerk. No time limit exists for this prohibition and it is effective while serving as Council President and after leaving office. Advisory Op. No. 88-009.

Prohibitions Imposed Upon the Clerk of Council

It must be noted that if the City Council elects the Council President's spouse to the position of Clerk, then the spouse will become subject to the Ohio Ethics Laws and related statutes. The Ethics Commission, in Advisory Opinion No. 91-007, examined the official duties of the clerk of council in a statutory city and determined that the clerk of council's duties are largely ministerial or clerical in nature. In Advisory Opinion No. 91-007, the Commission held:

Unlike the members of council, however, the clerk has no authority to introduce . . . [an] ordinance . . . or to determine its content or substance, and has no discretion or decision-making authority as to whether . . . [an] ordinance will be enacted. Rather the clerk has the mandatory and clerical duty imposed by law to authenticate and record . . . [an] ordinance.

However, the Clerk will be prohibited from participating in any matter that directly affects the private pecuniary interest of her spouse who is the Council President where the Clerk's objectivity and independence of judgment could be impaired. You should contact the Ethics Commission if issues arise concerning the limitations that the Ethics Law and related statutes impose upon the Clerk.

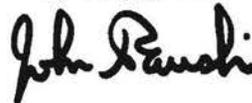
Conclusion

As explained below, the Ohio Ethics Law and related statutes do not preclude the City Council from electing the spouse of the President of City Council to the position of Clerk. But the Ethics Laws and related statutes limits the exercise of the Council President's authority with regard to matters involving his spouse's election as Clerk and matters that would affect her personal pecuniary interests that would arise after her election.

The Ethics Commission, as explained above, has issued advisory opinions to public agencies and individuals addressing the issue of members of the same family serving the same public agency. Advisory Ops. No. 90-010, 92-012, and 93-008. The Commission has warned that even in a situation where the decision to appoint a family member of a public official to a position within the same public agency is not per se prohibited, it could raise concerns that the appointment evidences preferential treatment for family members of public officials. In the instant situation, the decision to elect a specific individual to the position of Clerk is for the determination of City Council rather than the Ethics Commission. However, it must be stressed that the City Council, in making its decision, must consider the restrictions imposed by the Ohio Ethics Law and related statutes to ensure that private considerations of public officials and individuals do not interfere with the ability of a public agency to properly serve the public interest.

This informal advisory opinion was approved by the Ethics Commission at its meeting on April 11, 1997. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. If you have any further questions, please feel free to contact this Office again.

Very truly yours,



John Rawski
Staff Attorney